COURT OF APPEAL - SECOND DIST.
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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ERNEST BRAY, JR., Defendant and Appellant.	B093289 (Super. Ct. No. NA019462)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed.

Mary Holbrook, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Sharon Wooden Richard, Jaime L. Fuster, Assistant Supervising Deputy Attorneys General, and Robert W. Hicks, Deputy

Attorney General, for Plaintiff and Respondent.

Ernest Bray, Jr., took three video tapes without paying for them. He was arrested and charged with petty theft with a prior, with allegations that he had suffered four prior serious felony convictions (Pen. Code, § 667, subds. (b)-(i))[1] and served three prior prison terms (§ 667.5, subd. (b).) A jury convicted Bray as charged and returned true findings on the enhancement allegations. Bray's motion to strike the priors was denied and he was sentenced to state prison for a term of 25 years to life. He appeals, claiming instructional error and attacking the three strikes law on the usual grounds. We affirm.

DISCUSSION

I.

We reject Bray's contention that his sentence constitutes cruel and unusual punishment. A penalty offends the proscription against cruel and unusual punishment only when it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity. (*In re Lynch* (1972) 8 Cal.3d 410, 424). Contrary to Bray's suggestion, the three-pronged approach outlined in *Lynch* does not require us to give any weight at all to the relatively minor nature of his current offense. It permits us to focus on the offender rather than the offense, and the danger he poses to society. (*Id.* at pp. 425-427.) Here, Bray's record provides the justification for his sentence.

In 1979, when Bray was 19, he committed his first two robberies, during which a cohort used a firearm and fired shots at one of the victims. Four months later, Bray committed a third armed robbery. He was sentenced to concurrent terms for these three offenses and remained

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1. All section references are to the Penal Code.

in prison until November 1981, at which time he was released on work furlough. That term of incarceration did not put an end to Bray's life of crime and in July 1985, he was convicted of possession of a dangerous weapon. He was placed on probation with county jail time, to no avail. About the time his probation ended, Bray committed yet another robbery (his fourth). He was again sentenced to state prison, paroled in June 1989, and then discharged in July 1990. Within weeks, he was charged with battery (although those charges were later dismissed). In September 1991, he was convicted of a drug charge and was sentenced to another 90 days in jail. His current offense was committed on March 1994 -- but that wasn't the end. While out on bail, he committed another petty theft.

"Quite clearly, Bray's sentence is a result of his recidivist behavior and it is that behavior that justifies the twenty-five years to life term. Given Bray's inability to respond to shorter sentences, it is clear that this lengthy sentence is not cruel or unusual but simply the only way to protect society from his continuing offenses. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136-37; *People v. Ingram* (1995) 40 Cal.App.4th 1397, 1415; *People v. Gore* (1995) 42 Cal.App.4th 1, 14, review granted Nov. 22, 1995 (SO48866); *People v. Drew* (1995) 40 Cal.App.4th 811, 819 review granted March 14, 1996 (SO50984); *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1631.)

II.

"For the reasons stated in *People v. Markson* (1995) 41 Cal.App.4th 387, 392, review granted March 21, 1996 (SO1506),*People v. Spears* (1995) 40 Cal.App.4th 1683, 1688-1690, *People v. Kinsey*, *supra*, 40 Cal.App.4th at page 1629, and *People v. Cartwright*, *supra*, 39 Cal.App.4th at pages 1133-1134, we reject Bray's contention that the three strikes law was improperly enacted as an urgency measure."

III.

We reject Bray's contention that petty theft with a prior is not a felony for purposes of the three strikes law. (§§ 17, 666; *People v.*

Martin (1995) 32 Cal.App.4th 656, 660 [a prior conviction is a basis to elevate a petty theft to a felony]; *People v.* Bouzas (1991) 53 Cal.3d 467, 471 [a court is given discretion under section 666 to treat petty theft with a prior as a felony]; see also *People v. Hamilton* (1995) 40 Cal.App.4th 1615; *People v. Dent* (1995) 38 Cal.App.4th 1726; *People v. Loomis* (1995) 42 Cal.App.4th 404, review granted Nov. 16, 1995 (SO9374).) *People v. Bouzas, supra*, 53 Cal.3d 467, upon which Bray relies, did not directly consider the issue raised and thus does not support Bray's position.

IV.

Finally, we reject Bray's contention that the current version of CALJIC NO. 2.90 fails to specify the degree of certainty required for proof beyond a reasonable doubt. This instruction is identical to the language "suggested" in *People v. Freeman* (1994) 8 Cal.4th 450, 504, footnote 9, and is therefore binding on us *(Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). While we agree with Bray that the issue should be revisited to determine whether the United States Supreme Court's decision in *Victor v. Nebraska* (1994) 511 U.S. ____ [127 L.Ed.2d 583, 114 S.Ct. 1239], which led to our Supreme Court's decision in *Freeman,* really meant to equate "abiding conviction," without further definition, with proof beyond a reasonable doubt, that is an issue for our Supreme Court, not us.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

VOGEL (Miriam A.), J.

We concur:

SPENCER, P.J.

ORTEGA, J.